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FISCAL IMPACT REPORT

SPONSOR: Godbey DATE TYPED: 02/11/01 HB 290
 SHORT TITLE: Distribute Incarcerated Gang Information SB _____
 ANALYST: Trujillo

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
		See Narrative	\$ 176.1	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files
 Corrections Department (CD)
 Children Youth and Families Department (CYFD)
 Attorney General
 NM Public Defender (NMPD)

SUMMARY

Synopsis of Bill

HB290 authorizes the warden of each state correctional facility to take reasonable measures to restrict the conditions of confinement for an inmate who has a past or existing affiliation with a "gang", for the purpose of preventing recruitment of new gang members from the inmate general population. It also authorizes the warden to organize a gang intelligence unit to identify gangs and gang members in state correctional facilities, collect gang information and enter that information into CD's criminal management information system.

HB290 provides authorization in which CD may use a corrections administrator to collect, maintain, analyze and distribute gang information. The administrator may share gang information with officials who manage correctional facilities, county jails, municipal jails and law enforcement agencies in New Mexico.

HB290 defines "gang" to mean an organization, association or group of three or more persons that has a common name, common interest or a common identifying sign or symbol and whose members, individually or collectively, engage in criminal activity or serious misconduct violations.

The effective date of the bill is July 1, 2001.

Significant Issues

CD reports, like other corrections departments around the nation, the department faces a serious challenge in managing gangs within the prison system. HB290 addresses concerns raised by the panel of correction experts in the January 14, 2000 report provided to the New Mexico Legislature, Secretary of Corrections and the Attorney General, which recommended that CD "identify and isolate known gang leaders in high security, highly restrictive confinement for long term control." The report also recommended that "each institution should have an investigative supervisor who will be responsible for managing the intelligence-gathering program in the institution. This would include supervision of the drug surveillance program, phone monitoring, liaison with outside law enforcement, and other related duties."

The AG reports restrictions on inmates may implicate liberty interests and equal protection challenges. Definitions of "gang" have repeatedly been challenged for vagueness.

PERFORMANCE IMPLICATIONS

CD reports HB290 will have a positive impact upon the performance of the department's prison programs. By isolating known gang leaders and members, the department will be able to reduce their ability to orchestrate attacks upon other inmates and staff, arrange for the introduction of drugs and other contraband into the prison, coerce other inmates and recruit additional gang members. By sharing this information, the department will be able to assist in improving the performance of programs in the various county jails as well as the law enforcement efforts of other law enforcement agencies.

This bill does not contain additional performance measures.

FISCAL IMPLICATIONS

CD reports the bill will result in little if any cost increase to the department. With the activation of the Secure Control Unit at the South Facility of the Penitentiary of New Mexico, the department has the resources required to isolate those gang leaders and gang members who present a threat to the security of the prison. Furthermore, the department is currently utilizing corrections administrators and correctional officers to gather gang-related information. The costs associated with entering this information into the Criminal Management Information System and sharing it with the various county jails and other law-enforcement agencies should be minimal.

NMPD reports if it is required to litigate post-conviction assistance issues such as constitutional claims, the expenses would be significant. The office estimates needing the addition of one public defender III to handle post conviction Habeas petitions, one public Defender to handle appeals, and \$20,000 a year to pay attorneys for contract Habeas work. Depending upon actual case numbers, additional secretarial FTE may be required. The estimated cost is \$176.1 recurring general fund.

ADMINISTRATIVE IMPLICATIONS

According to CD, in both the short-term and the long-term, the HB290 will improve the department's ability to administer its prison system. Gathering and maintaining gang information, as well as isolating gang leaders and certain gang members will result in fewer violent incidents and fewer drugs within the prison system. The bill will result in a slight increase in the administrative burden upon a few personnel who will be responsible for sharing gang information with the various county jails and other law-enforcement agencies. The department will be able to absorb this additional administrative

burden.

The AG reports probable increase in workload for the appellate section lawyer who is responsible for inmate prison conditions lawsuits. Potential challenges to inmate restrictions are impossible to quantify at this time.

OTHER SUBSTANTIVE ISSUES

The AG discusses the following:

Restrictions on inmate conditions of confinement implicate both equal protection and liberty interests under the state and federal constitutions. The courts have, however, given wide-ranging deference to corrections officials whose restrictions on inmates are related to security within the prison system. The proposed restrictions are likely to survive challenges for this reason.

The definition of "gang" has been repeatedly challenged in the context of criminal sanctions. Vagueness challenges have focused on what is required in order to be "known" as a gang member and how much involvement in gang activity is required to be "actively engaged" in gang enterprises. See e.g. Jackson v. Department of Justice, 102 Cal. Rptr.2d 849 and People v. Robles, 23 Cal Rptr. 1106. The language in the proposed bill, which cites a "past or existing affiliation or association with a gang", is likely to be attacked on these same grounds. What constitutes an affiliation or association would need to be a substantial tie to the group criminal activity or misconduct to survive review.

NMPD provides the following discussion:

The language of the proposed bill allows a warden, independent of any other authority, to "take reasonably necessary measures to restrict the conditions of confinement for an inmate (emphasis added) who has a past or existing affiliation or association with a gang." The language "restrict the confinement" is not defined and seems to contemplate almost unrestricted discretion by the warden to potentially interfere with the rights of a prisoner. Aside from a constitutional prohibition against cruel and unusual punishment, the language seems to invest almost unlimited power in the warden to make a judgement that can not, by its very nature, be free from whim or caprice. Further, the phrase "past...affiliation or association with a gang" allows a warden to "restrict the conditions of confinement for an inmate" even if the inmate is no longer associated with organized criminal activity. The latter certainly amounts to ex post facto punishment. Coupled with the unbridled discretion apparently given the warden to determine what constitutes a "gang," the bill may have additional due process consequences. The definition of "gang" includes "an organization, association or group of three or more persons that has a common name, common interest...whose members, individually or collectively, engage in criminal activity or serious misconduct violations." (Emphasis

provided) The possibility that a group or association which may be religious, educational, social or cultural in nature, and therefore entirely legal may nevertheless create a suspicion of illegal activity and therefore subject its members to sanction. Again the bill's language lacks any safeguards that would insure against these potential violations or overstepping.